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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RENE MOJARRA,

Defendant and Appellant.

G055206

(Super. Ct. No. 12CF0764)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John Conley, Judge. Affirmed as modified.

Sharon G. Wrubel, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson, Meredith White and Genevieve Herbert, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Rene Mojarra was convicted of special circumstances murder for fatally shooting a rival gang member. On appeal, he contends the trial court erred in limiting his impeachment of a prosecution witness and failing to suppress statements used to prove his gang affiliation. He also challenges various aspects of his sentence. Because appellant was sentenced to life in prison without parole, we agree his parole revocation fine must be stricken, but in all other respects, we affirm the judgment.

### FACTS

On the night of March 12, 2012, Mario Hernandez, Jr., was shot in the parking garage of an apartment complex in Santa Ana. He sustained three gunshot wounds – to the head, chest and abdomen – and died at the hospital later that night. The shooting occurred in a neighborhood claimed by the Logan Street gang, to which Hernandez belonged. Following the shooting, witnesses saw a red van leaving the area. Surveillance cameras captured a man in a hoodie running from the parking garage and jumping in the passenger side of the van before it took off.

The following day, the police arrested Kevin C., then age 16, and questioned him for several hours. Initially, Kevin C. denied any involvement in the shooting. However, as the interview wore on, the police turned up the heat on him by suggesting they had evidence linking him to the shooting. They also told him appellant had implicated him as the person who shot Hernandez. Hearing this, Kevin C. suddenly became much more forthcoming with his interrogators.

Kevin C. admitted he “kicks it” with the Lopers gang, a rival of Logan Street, and is known by the gang as “Rabbit.” He said that on the day of Hernandez’s murder, he took his mother to work in her red minivan. After dropping her off, he saw appellant and picked him up. They drove to Kevin C.’s uncle’s house, but he wasn’t home. As they were leaving, appellant told Kevin C. to drive deeper into the neighborhood, which is claimed by Logan Street. Kevin C. did as told.

As they neared an apartment complex, appellant said, “I’m going to get these mother fuckers.” He then began to get out of the van, so Kevin C. stopped the vehicle to let him out before pulling up to a nearby parking garage. Moments later, Kevin C. heard three or four gunshots and saw appellant running his way. Appellant jumped into the van and told Kevin C. to “step on it.” (Kevin C. initially told investigators that was the first time he noticed appellant had a gun, but later in the interview, he admitted he saw the weapon before the shooting.) Kevin C. and appellant drove to Kevin C.’s house, where appellant took a shower and Kevin C. provided him with a fresh change of clothes.

Appellant was arrested two days after the shooting. At first, he denied knowing Kevin C., but he subsequently admitted hanging out with him two weeks earlier. He also denied ever being in Kevin C.’s mother’s minivan. However, during their investigation into the shooting, the police found appellant’s fingerprints on the passenger door of the vehicle.

Appellant and Kevin C. were both charged with special circumstances, gang-related murder. Before trial, Kevin C. pleaded guilty to voluntary manslaughter and street terrorism with a promised sentence of three years in prison. As part of his plea agreement, Kevin C. agreed to testify against appellant, and at trial, he told the jury basically the same story he told the police. Claiming he was simply in the wrong place at the wrong time, Kevin C. insisted he was a peaceful person and had no intention of assisting appellant in murdering Hernandez.

At trial, several police officers testified to their prior contacts with appellant during which he was in the company of – and admitted associating with – the Lopers. Based on those police contacts, as well as other evidence, a gang expert opined appellant was a Lopers member at the time of the shooting. The expert also believed Kevin C. was a member of that gang. He said the Lopers and Logan Street are long-time rivals, and before this case arose, a Lopers member was shot and killed in a separate incident.

According to the expert, such killings typically trigger retaliation. He surmised appellant and Kevin C. killed Hernandez to benefit the Lopers and to promote criminal conduct by that gang.

The defense argued appellant was not a gang member and had nothing to do with the shooting. It also presented evidence from Kevin C.'s cousin that she saw Kevin C. with a handgun the day before the shooting. Although the defense tried to pin responsibility for the shooting on Kevin C., the jury convicted appellant of first degree murder, street terrorism and possession of a firearm by a felon. (Pen. Code, §§ 187, subd. (a), 186.22, subd. (a), 29800, subd. (a)(1).) It also found appellant personally discharged a firearm and committed the murder for the benefit of a criminal street gang. (Pen. Code, §§ 12022.53, subd. (d) [firearm enhancement], 190.2, subd. (a)(22) [gang special circumstance], 186.22, subd. (b)(1) [gang enhancement].) The trial court sentenced appellant to life in prison without parole for committing special circumstances murder, plus 25 years to life for the firearm enhancement. Sentencing on all other counts and enhancements was stayed under Penal Code section 654.

## DISCUSSION

### *Exclusion of Impeachment Evidence*

Appellant contends the trial court abused its discretion and violated his right to a fair trial by limiting his ability to impeach Kevin C. We disagree.

Kevin C. was the key witness for the prosecution. He was the only witness who placed appellant at the murder scene, and he was able to describe the events leading up to and following the shooting. Therefore, defense counsel endeavored mightily to attack his credibility on cross-examination. Among other things, defense counsel questioned Kevin C. about the plea agreement he negotiated with the prosecution. Kevin C. admitted the agreement was a good deal for him in that it allowed him to serve just three years in prison for his involvement in a capital offense. He also acknowledged the

agreement was revocable and going so far as to say he wouldn't get the deal if he didn't testify to the prosecution's liking.

Defense counsel also cross-examined Kevin C. about various inconsistencies between his trial testimony and his prior statements to the police. And he got Kevin C. to admit he had participated in criminal activity with the Lopers in the past. While Kevin C. claimed he was a nonviolent person who never intended to hurt anyone, he admitted that about one year before the present case arose, he and fellow Loper Javier Cortez committed a pair of robberies together. Kevin C. did his best to minimize the robberies and downplay his involvement in them. But he eventually conceded he and Cortez threatened and physically assaulted the people they robbed. Indeed, Kevin C. admitted one of the victims was beaten and threatened with death, and the other was accosted at knifepoint.

In addition to asking Kevin C. about these prior gang-related robberies, defense counsel sought to question Kevin C. about various acts of violence and disobedience he allegedly engaged in from the time he was eight years old until the time he was arrested in this case, at the age of sixteen. In this regard, defense counsel wanted to introduce evidence Kevin C. frequently fought at school and was so incorrigible and ill-tempered that the police were often called to his home, he was temporarily committed under Welfare and Institutions Code section 5150, and his mother sent him to Mexico to live with relatives on multiple occasions. According to defense counsel, this evidence was relevant to refute Kevin C.'s claim of nonviolence and impugn his credibility generally. However, the court found the proposed evidence was superfluous compared to the robbery evidence, unduly remote in terms of timeliness, and of little probative value on the issue of Kevin C.'s credibility. It therefore sustained the prosecutor's objection to it under Evidence Code section 352.

That section gives trial courts "broad discretion to exclude evidence it deems irrelevant, cumulative, or unduly prejudicial or time-consuming." (*People v.*

*Pride* (1992) 3 Cal.4th 195, 235.) We will not disturb a court's decision to exclude evidence on these grounds absent a clear abuse of discretion. (*People v. Rodriguez* (1994) 8 Cal.4th 1060, 1124-1125.) To rise to that level, the record must demonstrate the court acted "in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*Ibid.*)

In addition to these state principles, we must keep in mind the exclusion of proffered defense evidence may implicate the defendant's federal fair trial rights.

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, [citation], or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, [citations], the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' [Citation.]" (*Crane v. Kentucky* (1986) 476 U.S. 683, 690.) Under these constitutional provisions, "the defendant in a criminal prosecution [has] the right of cross-examination, which includes exploration of bias. [Citation.]" (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 349.)

However, the constitution "guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (*Delaware v. Fensterer* (1985) 474 U.S. 15, 20, italics omitted.) Trial judges retain broad discretion to impose reasonable limits on cross-examination. (*People v. Quartermain* (1997) 16 Cal.4th 600, 623.) "A trial court's limitation on cross-examination pertaining to the credibility of a witness does not violate the confrontation clause unless a reasonable jury might have received a significantly different impression of the witness's credibility had the excluded cross-examination been permitted. [Citations.]" (*Id.* at pp. 623-624.)

In this case, the defense was allowed to cross-examine Kevin C. about a variety of issues, including the fact he had previously committed two violent robberies with a fellow gang member. The robbery evidence not only refuted Kevin C.'s claim he had a peaceful nature, it evidenced his lack of honesty and veracity. (See *People v.*

*Mendoza* (2000) 78 Cal.App.4th 918, 925 [like other theft-related crimes, robbery reflects moral turpitude and is thus probative of the defendant's credibility].) And as compared to the evidence of Kevin C.'s fighting and disobedience as a schoolboy, the robberies were both more egregious and more recent. It's hard to imagine how evidence of Kevin C.'s intemperate acts as a youth – some of which dated back to when he was a mere eight years old – would have affected the jury's impression of his credibility *above and beyond* the robbery evidence. (See *People v. Ayala* (2000) 23 Cal.4th 225, 301 [trial court did not err in excluding evidence of a witness's prior violent acts where the jury was already aware he had committed two murders and was a member of a prison gang].)

Irrespective of the excluded evidence, the jury knew Kevin C. had an incentive to lie about Hernandez's murder, and that he was, as the trial court put it, no "choirboy." Because the defense was allowed to extensively attack Kevin C.'s credibility without the contested impeachment evidence, we do not believe its exclusion constituted an abuse of discretion or violated appellant's fair trial rights. (*People v. Ardoin* (2011) 196 Cal.App.4th 102, 122.) No cause for reversal has been shown.

#### *Admissibility of Appellant's Statements*

Appellant also contends the trial court erred in admitting various statements he made to the police about his gang affiliation in the months leading up the shooting. He argues the statements should have been excluded under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), but we are unconvinced.

Appellant's statements were admitted to prove he was a gang member at the time he murdered Hernandez, which was relevant to the gang allegations and to establish his motive for the murder. In order to shed light on the circumstances under which the statements were made, the trial court conducted a hearing under Evidence Code section 402. At the hearing, Officer Ramiro Vergara testified he contacted appellant on October 1, 2011, about five months before the present case arose. Vergara

did not have any specific recollection of the contact, but he did document it on a field interview (f.i.) card, which the police use to identify, keep track of, and investigate suspected gang members. Based on the f.i. card, Vergara was able to ascertain the contact occurred in Lopers territory while appellant was on foot. However, Vergara could not tell whether the contact was a consensual encounter or a detention, and he did not know if he advised appellant of his *Miranda* rights. The f.i. card indicates that during the course of the contact, Vergara obtained appellant's personal information and asked him about his gang affiliation. According to the card, appellant told Vergara he "has been kicking back with [the] Lopers for [the] past year."

Next, Officer Gilbert Hernandez testified about a street contact he had with appellant in Lopers territory five months earlier, on May 31, 2011. As reflected in the f.i. card Hernandez prepared regarding that contact, the encounter was consensual in nature, and appellant denied any gang affiliation. However, appellant had a knife on him, and he was in the company of an admitted gang member. Based on the totality of the circumstances presented, Hernandez recorded on the f.i. card that appellant was a Lopers member.

Lastly, Officer Nelson Menendez testified about an encounter he had with appellant on October 24, 2010. That day, Menendez and his partner contacted appellant and a known Lopers member for drinking in public. After searching appellant and patting him down for weapons, Menendez sat him down on the curb and asked him about his probation, parole and gang status. Menendez could not remember if appellant was handcuffed at this time, but he was sure appellant had not been given his *Miranda* rights because he had not been formally arrested. Appellant told Menendez he was from Lopers, and "Ghost," a fellow Lopers member, had been killed recently. Menendez



issued appellant a “S.T.E.P. notice,”<sup>1</sup> informing him of the consequences of associating with a criminal street gang. Then he let him go.

Appellant challenges the trial court’s finding *Miranda* did not apply to these three encounters. In his view, the statements he made about his gang affiliation should have been suppressed because they were the product of custodial interrogation. We cannot agree.

The *Miranda* decision was designed to protect the Fifth Amendment by requiring the police to advise suspects of their right to remain silent before questioning. However, *Miranda* does not apply to every encounter between the police and a suspect; it only comes into play when the suspect is “in custody” at the time of questioning. (*Yarborough v. Alvarado* (2004) 541 U.S. 652, 660–663.) A person is in custody for *Miranda* purposes if he has been subjected to a formal arrest or his freedom of movement has been restricted to the degree associated with such an arrest. (*Id.* at p. 663.)

Appellant was not formally arrested during any of the three encounters at issue in this case. At most, he was subjected to a temporary detention involving brief questioning, which typically does not trigger *Miranda*. (*Maryland v. Shatzer* (2010) 559 U.S. 98, 113; *Berkemer v. McCarty* (1984) 468 U.S. 420, 439-440; *People v. Clair* (1992) 2 Cal.4th 629, 679; *People v. Vasquez* (1993) 14 Cal.App.4th 1158, 1163-1165; *People v. Lopez* (1985) 163 Cal.App.3d 602, 607-609.) The *Miranda* rule is generally deemed inapt in this situation “because the restraint on liberty often occurs in a nonthreatening or noncompulsive public environment and its duration is limited. [Citations.]” (*People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1165.)

Here, the only encounter that arguably went beyond a routine detention is the one in which the police contacted appellant in the alley in October 2010. On that occasion, the police were investigating suspected criminal behavior – public drinking –

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<sup>1</sup> S.T.E.P. stands for the Street Terrorism Enforcement and Prevention Act. (See Pen. Code, § 186.20 et. seq.)

so they patted appellant down, searched him, and sat him down on the curb. They may even have placed appellant in handcuffs while they were talking to him and issuing him a S.T.E.P. notice. However, this all took place in public view (as opposed to the isolated confines of a police interrogation room), appellant was accompanied by his friend (he was not alone in a police dominated setting), and he was released at the end of the encounter, which lasted only about 20 minutes. Given the transitory nature of the detention, we do not believe it rose to the level of custody for purposes of *Miranda*. (See *In re Joseph R.* (1998) 65 Cal.App.4th 954 [despite being temporarily handcuffed, suspect was not in custody during brief detention during which he was subjected to police questioning].)

Even if the custody requirement were satisfied, *Miranda* would still not be implicated in this case because appellant was not subjected to “interrogation,” i.e., he was not asked anything by the officers that was “reasonably likely to elicit an incriminating response[.]” (*Rhode Island v. Innis* (1980) 446 U.S. 291, 301.) In arguing otherwise, appellant points out that in *People v. Elizalde* (2015) 61 Cal.4th 523 (*Elizalde*) the California Supreme Court held that eliciting information about a suspect’s gang affiliation is likely to have incriminating consequences when the person is in custody for a crime he is suspected of having already committed. (*Id.* at pp. 533-540 [*Miranda* applies to gang-related statements obtained when the defendant is being booked for a completed criminal offense that is frequently committed for the benefit of a gang].) However, “[n]othing the *Elizalde* court wrote suggests its holding should apply to crimes that have not yet been committed at the time of the inquiry[.]” (*People v. Villa-Gomez* (2017) 9 Cal.App.5th 527, 537.)

The gang statements at issue in this case were elicited from appellant months before Hernandez was murdered. At the time they were made, appellant was not under arrest or charged with any particular offense. And since being a gang member is not a crime, the statements had no incriminating consequences in and of themselves.

They could only become incriminating if appellant committed a future crime, which of course is what he did. We are not prepared to say that was a foregone conclusion. The presumption of innocence attaches to everyone, including gang members, and although certain segments of society are more prone to criminal activity than others, there is nothing in the record to suggest appellant was reasonably likely to commit a gang offense following the detentions described above. Therefore, when the police asked him about his gang affiliation during those detentions, the questions were not reasonably likely to elicit an incriminating response. Accordingly, they did not constitute interrogation for *Miranda* purposes, and the trial court did not err in admitting them into evidence. (See *People v. Villa-Gomez, supra*, 9 Cal.App.5th at pp. 536-539 and cases cited therein [because the crime of which the defendant was convicted had not yet been committed when he answered questions about his gang status during an immigration hold, those questions did not amount to interrogation under *Miranda*]; compare *People v. Roberts* (2017) 13 Cal.App.5th 565, 571-576 [un-*Mirandized* gang statements elicited while the defendant was under arrest for an earlier crime cannot be used in his prosecution for a subsequent offense].)

Even assuming the admission of appellant's gang statements was erroneous, the error was harmless beyond a reasonable doubt because his gang membership was amply proven by "independent and uncontradicted evidence[.]" (*Elizalde, supra*, 61 Cal.4th at p. 542.) In that regard, Officer Menendez testified that irrespective of the drinking-in-public incident during which he contacted appellant in October 2010, he knew appellant to be a Lopers gang member based on his personal knowledge of, and prior contacts with, him. In fact, the record shows appellant was stopped by the police in Lopers territory with other Loper members on numerous occasions before the instant case arose. In addition, appellant has multiple gang tattoos, and, as the gang expert explained, Hernandez's violent murder had the markings of a

gang hit. Thus, any error in admitting appellant's gang statements into evidence is not cause for reversal. (*Ibid.*)

### *Sentencing Issues*

Lastly, appellant raises two sentencing issues, the first of which is undisputed. He correctly notes that because he was sentenced to life without parole, the trial court erred in imposing a parole revocation fine under Penal Code section 1202.45. (*People v. Petznick* (2003) 114 Cal.App.4th 663, 687.) We will modify the judgment to strike that fine.

Appellant also challenges his 25-year-to-life enhancement for personally discharging a firearm under Penal Code section 12022.53, subdivision (d). At the time appellant was sentenced, trial courts did not have authority to strike that enhancement. However, that changed with the passage of Penal Code section 12022.53, subdivision (h). Effective January 1, 2018, that provision gives trial courts discretion to dismiss firearm enhancements in the interest of justice, and, as respondent concedes, it applies retroactively to appellant's case because it is not yet final. (*People v. McVey* (2018) 24 Cal.App.5th 405, 418-419.) In light of this, appellant seeks a remand. He contends that if given the chance to do so, the trial court would utilize this new law to strike his firearm enhancement in the interest of justice because he came from a broken home and was only 19 years old when he murdered Hernandez.

However, even if the trial court struck the firearm enhancement it would have no practical effect on appellant's sentence since he was given life without parole on the murder count. Moreover, the record shows that during sentencing, the trial court denied appellant's request to run the firearm enhancement concurrently to his murder sentence, and it denied appellant's request to strike the special circumstance allegation in the interest of justice. We believe this demonstrates the trial court would not have stricken appellant's firearm enhancement, even if it had been asked and empowered to do

so. Consequently, no remand is required. (*People v. McVey, supra*, 24 Cal.App.5th at pp. 418-419.)

#### DISPOSITION

Appellant's parole revocation fine is stricken. In all other respects, the judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.